84-284

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NULL MANUFACTURING CO.,

Petitioner

v.

MAYZELL LITTLEJOHN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This case, brought against an employer under 42 U.S.C.§2000e-2, involves no claim or evidence of class discrimination or general racial bias on the part of the employer and relates only to a single incident, as to which there is controversy with regard to the employer's assigning certain temporary work to the plaintiff, who is black, instead of assigning such work to another employee, who is white. The plaintiff was discharged by the employer for refusing to perform the assigned work. No evidence having been produced, however, either direct or circumstantial, that the employer either made the assignment to the plaintiff, or discharged the plaintiff, "because of" her race, did not the District Court err

in ruling that the employer had violated 42 U.S.C.§2000e-2?

Is not error on the part of the District Court further established by that Court's simultaneous, and contrary, ruling that the plaintiff had failed "to demonstrate" that the defendant "committed" any unlawful act against the plaintiff "willfully and for the clear purpose of discriminating against the plaintiff because of her race"?

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OPINIONS OF THE COURTS AND THE ADMINISTRATIVE AGENCY BELJW

The opinion of the United States Court of Appeals for the Fourth Circuit and the Order of that Court upon a Petition by the defendant for rehearing are hereinafter set forth, in the Appendix to this Petition.

The Memorandum decision and Order of the United States District Court for the Western District of North Carolina, is likewise set forth in the Appendix to this Petition,

A Determination by the United States Equal Employment Opportunity Commission is also set forth in the Appendix to this Petition.

JURISDICTION OF THIS COURT

The opinion of the United States Court

of Appeals for the Fourth Circuit, embodying its decision and judgment in this case, was rendered on April 4, 1984, and was entered on that date.

Thereafter, within apt time, the Petitioner filed with the Court of Appeals a Petition for Rehearing and Suggestion for Rehearing en banc, which was denied on May 22, 1984. The filing of this Petition for Certiorari is within ninety days from the date of such denial of rehearing.

Jurisdiction to review the decision of the Court of Appeals by writ of certiorari is conferred on this Court by the provisions of 28 U.S.C.§1254(1).

STATUTORY PROVISIONS INVOLVED

"It shall be an unlawful employment

practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ."

42 U.S.C.§2000e-2

STATEMENT OF THE CASE

Prior to instituting this suit, the plaintiff filed a charge against the defendant with the United States Equal Employment Opportunity Commission. The claimant was represented by counsel before

the Commission, and evidence and argument were presented by the claimant and by the defendant to the Commission. The claimant alleged then, as she has throughout the case, that the "Respondent discriminated against her because of her race (Black) by discharging her" (131).[1] After lengthy investigation, the Commission ruled upon "the merits" that "Examination of the evidence indicates that there is not reasonable cause to believe that" the claimant's "allegation is true" (131). Thereafter, the plaintiff filed the present

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[1]Unless otherwise indicated, page references are to the Joint Appendix filed by the plaintiff and the defendant in the Court of Appeals, which sets forth the complete record made in the District Court. In accordance with the permission granted in this Court's Rule 19, the Petitioner has requested the Clerk of the Court of Appeals to forward a certified copy of such Joint Appendix to the Clerk of this Court.

suit in the United States District Court for the Western District of North Carolina.

Evidence presented at trial in the District Court showed the following. The defendant Company is engaged in the furniture manufacturing business (16-18).[1] Its operations are located in the vicinity of the town of Maiden, North Carolina, and the Company had approximately 190 employees at the time the plaintiff worked there. The plaintiff was hired as a stain sprayer and wiper in the Company's Finishing Department in 1977, and continued in that work until July of 1980.

The Finishing Department supervisor,

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[1]The defendant, a North Carolina corporation, is a wholly owned subsidiary of Carolina Mills, Inc., a North Carolina corporation.

J. D. O'Leary, testified, without contradiction, that late in July, 1980, the plaintiff for the first time complained to him that "the stain made her sick," and that he "told her" he "didn't understand that making her sick" and that "she would need to go to a doctor and see" (148); that she did so and that the doctor gave her a note suggesting that she "may need to work in a clear atmosphere" (19, 141). It was undisputed that the supervisor thereupon assigned the plaintiff to a "hand-sanding" job, where she would have no contact with the furniture stain (21).

The supervisor testified that "even though" he did this, he "didn't believe that the stain was causing" the plaintiff's problem, and that in "twenty-five years" of experience with furniture finishing, he

had never known this stain to produce "reaction" such as the plaintiff was complaining of; that he "had never had a person" tell him "that it made them sick"; that upon his calling the doctor about the matter, the doctor said that the plaintiff's "reaction" complaint "was not a medical fact," and that the doctor further stated that he himself could only "take her word" for it (41, 149).

The supervisor also testified that upon assigning the plaintiff to hand-sanding in the Finishing Department, he "told her she would go to hand-sanding with the understanding" that still being an employee in finishing, it might occasionally be necessary to call on her to do some temporary stain wiping (42, 79-80). The District Court noted that in the plaintiff's

testimony, she denied this, but the Court made no finding that she was not so told (176).

Approximately a month later, on August 27, 1980, a stain wiper in the Finishing Department had to go home suddenly, with only three hours of work time remaining in the shift. The other employees in the department who could capably do stain wiping were engaged in production work which could not be interrupted, and the supervisor called on the plaintiff, as an experienced stain wiper, to fill the job for the remaining three hours (22). This the plaintiff flatly refused to do and flew into a "rage" (155). After effort to discuss the situation with her was made, but to no avail, she was discharged (82-84).

The supervisor testified that during the weeks after the plaintiff was moved from stain wiping to hand-sanding in the Finishing Department, "other ladies" in that department, including "the white ladies," were called on to do temporary stain wiping (84-85). He stated, without contradiction, that each of the following white women did so each time he asked them, namely: Connie Morrow (27), Frances Wilkerson (30-31), Jettie Sue Hoyle (39, 159-160), and Roberta Jane Boles (39-40).

The only employee referred to anywhere in the District Court's decision and Order as having been excused from temporary stints of stain wiping was a white man, Lester Taylor, whose job was hand-sanding in the Finishing Depart-

ment (23, 174-180). The District Court emphasized that the Company "made accommodation" for the "caucasian hand-sander," Taylor, but would not do so for the plaintiff. The supervisor explained, however that he knew that Taylor was "handicapped" with regard to "eyesight," which would "prevent him from wiping stain," and this testimony was not in any way contradicted (25, 26). Since stain wiping required close observation as to the grain and shading of the wood, quality production reasonably required that this work not be done by an employee who "can't see very well" (25).

Further, upon the issue of whether racial or anti-black bias was involved in the defendant's discharge of the plaintiff, statistics produced by the defendant, at

the plaintiff's demand, show that the ratios of blacks and whites employed in the defendant's Finishing Department, and in the various jobs of the Department, are, and have been, virtually constant throughout all the time periods of the requested statistics (137). It is further undisputed that there are as many black employees in the defendant's Finishing Department as was the case when the plaintiff was there, and that no other black employee has been terminated (157, 165).

REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI

Although this case deals only with the discharge of a single employee, its facts and circumstances bring into unusually clear focus a frequent error in

the application of 42 U.S.C.§2000e-2. The Petitioner respectfully submits that this case is an uncomplicated example of what might be termed a rather prevalent and continuing inadvertence with regard to the exact provisions of this important Statute - and that the case therefore justifies review by this Court of the rulings which have been made in the courts below.

There can be no doubt that the legislation here involved came about in large measure as a result of wide-spread belief that there should be improvement in the position of "minorities" with regard to matters of employment. It is nevertheless necessary that constant attention be given to the specifications and perimeters of the Statute which actually became enacted.

Otherwise, even courts of law may

tend to proceed upon a rather natural impression that if, for example, it is demonstrated that a black employee has been unfairly or unjustly or discriminatorily discharged from his or her employment, then this Statute has been violated. This natural impression, however, is of course a misconception. Indeed, it misses the very essence of what was enacted in the Statute. 42 U.S.C.§2000e-2 outlaws no unfairness or injustice or discrimination, unless it is proved to have been imposed upon an individual "because of such individual's race, color, religion, sex, or national origin" - and as this Court has repeatedly emphasized, "the ultimate burden" of making such proof "remains at all times upon the plaintiff." Texas Department v. Burdine, 450 U.S. 248, 253,

67 L.Ed.2d 207, 215, 101 S.Ct. 1089 (1981).

The Petitioner submits that the evidence in the present case shows that it has indeed not treated the plaintiff unfairly or unjustly or wrongfully in any way. Entirely apart from that, however, in no sense whatever has the plaintiff proved, in this case, the central and controlling elements required by this Statute, namely, that the defendant discriminated against the plaintiff and did so because of her being a black person.

The only circumstance in the entire case which the plaintiff even purports to bring forward, in satisfaction of this imperative requirement, is the fact that when there were two employees available to work at wiping stain during the three hour emergency period hereinabove referred to,

namely, the plaintiff, a black employee, and Lester Taylor, a white employee, the supervisor assigned the work to the plaintiff instead of Taylor. Is there anything in this which could be considered as supplanting the plaintiff's burden of proof and establishing without more that the supervisor assigned the work in question to the plaintiff "because" of her being black? If so, such inference is immediately dispelled by the undisputed evidence that whereas the plaintiff had years of experience and capability in stain wiping, Taylor could not properly do such work at all because of his poor eyesight. Such is the untenable ground upon which the plaintiff takes her stand, and such is the vacuous state of the evidence upon which the courts below

have ruled that the Petitioner violated federal law.

The record in this case reveals clear signs of misgivings about this all along the way. As has been noted above, in the "Statement of the Case," the United States Equal Employment Opportunity Commission, after full investigation, ruled that "there is not reasonable cause to believe" that "Respondent discriminated against" the plaintiff "because of her race (Black)".[1] The majority opinion in the Court of Appeals says that the plaintiff's "showing of discrimination does not strike this court as being particularly strong".[2] The dissenting opinion in the Court of Appeals

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[1] Appendix to this Petition, 42a.

[2] Appendix to this Petition, 9a.

emphasizes that "there is just no evidence of discrimination 'because of race' in this record."[1]

The majority opinion in the Court of Appeals says that "ultimately, Null's solicitous treatment of Taylor, when viewed in conjunction with the company's failure to require any whites to wipe stain, convinced the trial court that Null's proffered explanations were unworthy of credence."[2] In this the majority opinion clearly overlooks the fact that the supervisor did not make his choice between Taylor and the plaintiff out of solicitude for Taylor, but out of concern for the quality of the product - in that the

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[1]Appendix to this Petition, 14a.

[2]Appendix to this Petition, 13a.

supervisor well knew that Taylor's limited eyesight rendered him incapable of doing this stain work properly.

As to the majority opinion's reference to "the company's failure to require any whites to wipe stain," the Petitioner would call attention to the specific and undisputed evidence, hereinabove cited, that various white employees had often been called on to wipe stain temporarily, and had never failed to do so. If however the majority opinion is referring to the supervisor's not calling upon some other employee than either Taylor or the plaintiff on the occasion in question, it has been pointed out above that the undisputed evidence was that all employees in the Finishing Department, other than these two, were at that time engaged in

production work which could not be interrupted.

The majority opinion's statement that the trial court was "convinced" that "Null's proffered explanations were unworthy of credence" invites the obvious reply that discrediting the Company's evidence does not supply the basic void in the plaintiff's evidence. If the Company did treat the plaintiff unfairly or unjustly or inconsiderately or heavy-handedly, where is the proof that it was "because of" the plaintiff's race that the Company did so?

Neither the District Court nor the Court of Appeals points to any such evidence whatever. It is respectfully submitted that the Statute cannot be thus read or applied in disregard of what its central provision demands.

Finally, it is to be observed that the decision and judgment of the District Court in this case is fundamentally and fatally self-contradictory. For it concedes that the plaintiff failed "to demonstrate" that the defendant "committed" any unlawful act against the plaintiff "willfully and for the clear purpose of discriminating against the plaintiff because of her race" (180).

Elsewhere in its decision, the Court had stated that "the sole issue for determination is whether plaintiff's termination amounted to unlawful discrination against her because of her race" (177). Thereafter, in the same decision, as quoted above in the preceding paragraph, the Court found and concluded that the defendant had not "committed" any act

for the "purpose of discriminating against the plaintiff because of her race." Thereby the District Court acquitted the defendant of violating 42 U.S.C.§2000e-2.

It is to be noted that in setting forth this finding and conclusion, the Court spoke of it as negating the granting of "punitive damages". That, however, cannot alter the fact that this finding and conclusion also totally negated violation of the Statute. The defendant urged this upon the Court of Appeals, but the decision of that Court says nothing about this fatal anomaly. From whatever angle it is approached, the District Court's own finding and conclusion as to the plaintiff's failure of proof prevents the rendering of a judgment against the defendant in this

case.

It may be that the District Court, in this finding and conclusion, meant to imply that the defendant is guilty only of a non-intentional or non-purposeful violation of 42 U.S.C.§2000e-2. If so, the answer is that there is no such thing as a non-intentional or non-purposeful violation of this Statute. For it cannot sensibly be said that an employer has taken action against a person "because of" that person's race, unless that person's race was indeed a conscious consideration and motivation behind the employer's action.

Upon all of the foregoing the defendant in this case prays that the

Court grant this Petition for Certiorari.

Whiteford S. Blakeney
John O. Pollard

Attorneys for the
Petitioner

Of Counsel:

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APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

APPENDIX

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[1] For the complete record made in the District Court, see the Joint Appendix filed by the plaintiff and the defendant in the Court of Appeals, a copy of which the Petitioner has requested the Clerk of the Court of Appeals to forward to the Clerk of this Court.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1523

MAYZELL LITTLEJOHN,

Appellee,

v.

NULL MANUFACTURING CO.,

Appellant.

O R D E R

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge

Murnaghan for a panel consisting of Judge Winter, Judge Murnaghan, and Judge Chapman.

For the Court,

/s/ William K. Slate, II
Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1523

MAYZELL LITTLEJOHN,

Appellee,

v.

NULL MANUFACTURING CO.,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Robert D. Potter, District Judge. (ST-C-81-143)

Argued: December 7, 1983
Decided: April 4, 1984

Before WINTER, Chief Judge, MURNAGHAN and CHAPMAN, Circuit Judges

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Whiteford S. Blakeney (John O. Pollard, Blakeney, Alexander & Machen on brief) for Appellant; J. LeVonne Chambers, (Jonathan Wallas, Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A. on brief) for Appellee.

MURNAGHAN, Circuit Judge:

Null Manufacturing Company appeals from a judgment ordering reinstatement and other relief for former employee Mayzell Littlejohn. Littlejohn, a black female, originally filed a charge of discrimination with the Equal Employment Opportunity Commission on September 15, 1980 under Title VII of the Civil Rights Act of 1964.[1] After the Commission found no reasonable cause to believe that Null had discriminated against Littlejohn because of her race, she pursued her private right of action, alleging that

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[1] See 42 U.S.C. §2000e-2(a)(1) (it shall be an unlawful employment practice for an employer to discharge or otherwise to discriminate against any individual with respect to terms or conditions of employment because of such individual's race, color, religion, sex, or national origin).

Null discriminated on the basis of race by denying her a permanent transfer and other terms and conditions of employment granted other employees, and by discharging her on August 27, 1980.

Evidence was presented at trial to show that the discharge was the ultimate result of a series of disagreements between Littlejohn and Null regarding her alleged health problems and performance of assigned duties. At the time of discharge, Littlejohn held the position of "hand sander" at Null's Catawba County, North Carolina furniture manufacturing plant. Littlejohn had orignally held the position of "stain sprayer and wiper," but was transferred to hand sanding by supervisor J. D. O'Leary after she presented a doctor's memorandum that the oil-solvent furniture stain caused her to

suffer a skin rash, breathing problems, and nausea.[2] Not content to accept the doctor's report, and not believing that the stain caused Littlejohn's reaction, O'Leary telephoned her doctor directly to corroborate her claims of adverse reaction.

Finally convinced that a transfer was warranted, O'Leary did transfer Littlejohn on July 28, 1980. Whereas

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[2]Dr. Forrest Peeler, a family physician who had often treated employees of the nearby Null facility, drafted a brief memorandum to Null on July 25, 1980, in which he diagnosed Littlejohn as having an "intolerance to breathing odor from stain she sprays," reminded Null of Littlejohn's rash in 1979, and stated that she "may need to work in clean atmosphere." At trial, Dr. Peeler testified that Null had always been receptive to his suggestions regarding the health problems of other employees: "Usually if I state that a patient is having problems the management follows through. I haven't had any problems at all."

O'Leary testified at trial that he told Littlejohn "that she would go to hand sanding with the understanding that she would be called upon to wipe stain" Littlejohn herself recalled, "He gave me a hand sanding job. He told me if I asked for anything else I was going out the door, and that was it."

Littlejohn fulfilled her hand sanding duties without incident until August 27, 1980, when O'Leary asked her to return to staining for a three-hour period. The request was made even though O'Leary knew of her allergic reaction, and even though several white employees could also have been tapped to do the staining. Specifically, O'Leary declined to ask the white male sander Lester Taylor to perform the temporary staining job, ostensibly because

Taylor had bad eyesight. O'Leary made his decision although he had never been presented with affirmative medical evidence of Taylor's vision problems, whereas he had reviewed Littlejohn's medical reports and had even quizzed her treating physician.

Null attempted to establish at trial that all employees worked on a flexible basis, responding as virtual jacks-of-all trades within the plant as the need arose; thus, hand sanders would commonly wipe stain, depending on product flow on any given day. By contrast, Littlejohn testified that, at no time during her tenure as sander, did O'Leary ask any white employee to return to the staining area. When she herself refused to wipe stain on August 27, 1980, she was discharged.

The district court ultimately found

that Null's explanation for the discharge was "wholly unworthy of any credence" and entered judgment for Littlejohn. The court was particularly aware of Null's failure to substantiate its claims of business necessity in forcing Littlejohn to wipe stain: "When cross-examined about the 'business necessity' and 'work flow,' Mr. O'Leary could only repeat those conclusory words, giving no facts of the employment experience of Plaintiff's co-workers, their education and skills . . . or work-flow organization charts to support those conclusions."

Although Littlejohn's showing of discrimination does not strike this Court as being particularly strong, we "may only reverse a district court's finding of discriminatory intent if [we conclude]

that the finding is clearly erroneous under Rule 52(a)." Pullman-Standard v. Swint, 456 U.S. 273 (1982) (construing "intention to discriminate" under seniority provisions in 42 U.S.C. §2000e-2(h); "clearly erroneous" standard applies to both ultimate and subsidiary facts).[3] Under this narrow standard of review, we sustain the verdict of the district court that racial discrimination motivated Null in its discharge of Littlejohn. By emphasizing the favorable treatment afforded the white hand sander Taylor, and by giving particular credence to the testimony of Littlejohn, the

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[3]See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (reversal proper under narrow "clearly erroneous" standard when trial judge has ignored or overlooked certain evidence, thereby leaving appellate court with the "definite and firm conviction" that a mistake has been made).

district court properly drew upon circumstantial evidence to reach a permissible inference of discriminatory intent. See Wright v. National Archives and Records Service, 609 F.2d 702 (4th Cir. 1979) (since the issue of disparate treatment is fundamentally one concerning state of mind of the employer, the available evidence will typically be "wholly circumstantial").

To be sure, it is clear that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). This Court has likewise made it clear that "the ultimate burden of persuasion never leaves the plaintiff's

shoulders." Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980).

Nonetheless, Littlejohn did offer evidence sufficient to establish discriminatory intent under the three-part analysis mandated in Burdine. First, Littlejohn presented a prima facie case of discrimination by a preponderance of the evidence (she, a black woman with a medically documented allergy, was required to wipe stain when the white Taylor was not so required). Second, while Null was able to articulate a legitimate, non-discriminatory reason for requiring Littlejohn to wipe stain and subsequently terminating her employment ("business necessity" of preserving smooth product flow), Littlejohn adequately shouldered her third-step burden of demonstrating

pretext on the part of Null. Ultimately, Null's solicitous treatment of Taylor, when viewed in conjunction with the company's failure to require any whites to wipe stain,[4] convinced the trial court that Null's proffered explanations were unworthy of credence. Since it was the province of the trial court to exercise its own judgment in assessing witness credibility to "decide which party's explanation of the employer's motivation it believe[d]," we decline to disturb the judgment of the trial court, and affirm the judgment in favor of Littlejohn. United States Postal Service Board of Directors v. Aikens, __U.S. __, 51 U.S.L.W. 4354 (1983).

AFFIRMED.

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[4]See McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) (evidence regarding treatment of similarly situated white employees would be "especially relevant" to show pretext).

CHAPMAN, Circuit Judge, dissenting:

With due respect to the majority opinion, which admits plaintiff's showing of discrimination is not "particularly strong", I must dissent.

If Littlejohn has made out a case of racial discrimination in employment, then any employer discharging a black or other protected minority member is in peril. There is just no evidence of discrimination "because of race" in this record.[1]

The district court found:

> It is true that the Plaintiff produced no evidence of verbalized racial animus on the part of Mr. O'Leary. It is also true that

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[1] EEOC after an investigation, issued its "determination" that there was no reasonable cause to believe Null had discriminated against plaintiff "because of her race."

the Defendant introduced evidence of a corporate policy of equal opportunity for all employees. However, "Congress directed the thrust of the [Civil Rights] Act to the consequences of employment practices, not simply the motivation." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), (emphasis in original).

From all the evidence then, this Court is compelled to find that the Defendant, through its supervisor, Mr. O'Leary, intended to (1) question the validity of the plaintiff's allergy and honor the excuse in appearance only, (2) require her, in spite of this condition, to perform work

in the area of exposure to known irritants, and (3) enforce its decision not to honor her medical excuse by firing her when she refused to perform the work that triggered her allergy. The defendant took these three actions while intending: (a) not to require such "medical proof" of physical ailments of her caucasian co-workers and (b) not to require caucasion co-workers with undocumented physical ailments, to work in adverse conditions.

Mr. O'Leary's question as to the validity of plaintiff's allergy was a natural reaction and cannot serve as evidence of or even raise an inference

of racial discrimination. Mr. O'Leary came to work for Null on July 15, 1979 with 20 years experience in furniture finishing. He testified in these 20 years he had never heard of an allergic reaction to the stains being used by the plaintiff. Under these circumstances an inquiry of the doctor was certainly called for and did not include any racial overtones.

Dr. Peeler testified that he had seen other Null employees with allergic reaction to chemicals. He did not identify the stains in question as having been involved in previous cases and he did not identify employees from any particular department of Null as having had reactions nor did he indicate the race of any of the employees he had treated for allergic reactions. There has been no showing that whites with

allergic reactions have been treated any differently from blacks with similar reactions.

There is no evidence that the plaintiff was asked to wipe stain in any emergency situation (the wiper had been called home), and for only a short period of time, because she was black. The evidence shows that she had experience in this work and that she was only being asked to wipe and not to spray, and for only three hours.

The district court finds that Null discriminated against Littlejohn because of her race when O'Leary did not ask a white male employee, Taylor, to wipe the stain because Taylor had "bad eyes", and the district court further concluded that since O'Leary did not require a doctor's

certificate from Taylor or call Taylor's ophthalmologist, that these were "undocumented physical ailments." Taylor's condition is in no sense comparable to Littlejohn's. Taylor's "bad eyes" did not result from nor were they aggravated by wiping stain. Taylor just could not see well enough to wipe stain in the correct direction. A supervisor does not need a doctor's certificate to know that a worker cannot wipe stain with the grain. Taylor's eye problem and the decision not to use him were matters of quality control in manufacturing furniture and will not support an inference of racial discrimination.

The one essential element constituting a violation of 42 U.S.C.

2000e-2(a)(1)[2] is proof that the plaintiff's race was the reason or cause for the adverse action taken by the employer. There is no remedy under the statute where the evidence merely shows that an employer made a decision which is unjust or unfair. There must be evidence to show that the decision was made because of such individual's race.

The statement of Dr. Peeler found in footnote 2 of the majority opinion is not sufficient to find that the defendant did not require medical proof of physical ailments of caucasian employees or excuse such caucasian employees, with undocumented physical ailments, from working

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[2]The pertinent language applicable to this case being: "It shall be an unlawful employment practice for an employer . . . to discharge any individual . . ., because of such individual's race . . ."

in adverse conditions.

The plaintiff is black and has been discharged, but the record does not support a jump from these two facts to the conclusion that the discharge was because of race.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

ST-C-81-143

MAYZELL LITTLEJOHN,

Plaintiff,

v.

NULL MANUFACTURING CO.,

Defendant

MEMORANDUM AND ORDER

THIS MATTER coming on to be heard and being heard before the undersigned United States District Court Judge for the Western District of North Carolina on the 28th day of January, 1982, at the United States Courthouse in Statesville, North Carolina for trial by the Court, sitting without a jury; and

Mr. J. Levonne Chambers, Attorney at Law, having appeared for the plaintiff,

and Mr. John O. Pollard, Attorney at Law, having appeared for the Defendant; and

The Court, having considered the arguments of counsel, and being of the opinion that: (1) the Plaintiff sustained her burden of proving a prima facie case of discrimination by a preponderance of the evidence, (2) the Defendant produced evidence of "business necessity" justification for the disparate treatment, and (3) the Plaintiff sustained her burden of proving the Defendant's asserted justification to be pretextual, the Court enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

(1) The Plaintiff, Mayzell Littlejohn, is a black citizen of the United States who at all times pertinent to this liti-

gation resided in Maiden, Catawba County, North Carolina. The Plaintiff was hired by the Defendant on March 27, 1978 as a Stain Sprayer and Wiper in the Finishing Department in Plant No. 2 and held that position until July 28, 1980. The Plaintiff was discharged by the Defendant on August 27, 1980.

(2) As a Stain Sprayer and Wiper, the Plaintiff was occasionally requested by the Defendant's agents to work in other areas of Plant No. 2 for brief periods of time. In addition to wiping and spraying stain, the Plaintiff has gained some experience in cutting glue, upholstering, and sanding. The temporary placement of workers in different departments was necessitated to maintain production levels in Plant No. 2.

(3) The Defendant is a corporation doing business in Maiden, North Carolina since 1977. It employed Mr. J. D. O'Leary from July 15, 1979 to September, 1982 as finishing supervisor in Plant No. 2 and Mr. T. W. Gamble, Jr. as Plant Superintendent of Plant No. 2.

(4) On April 23, 1979, while employed as a Stain Sprayer and Wiper, the Plaintiff was treated by Dr. Peeler for a rash on her hands. Dr. Peeler, a family practitioner whose office is in close proximity to Defendant's Plant No. 2, frequently cares for employees of the Defendant, and has treated more than ten such employees with allergic chemical reactions. Dr. Peeler diagnosed the Plaintiff's rash as allergic in origin "thought to be due to allergy to stain," being typical of contact

dermititis; he prescribed anti-allergic medicine (Pl. Exh. 8).

(5) On July 25, 1980, still employed as a Stain Sprayer and Wiper, the Plaintiff returned to Dr. Peeler for treatment of a breathing difficulty and nausea. Dr. Peeler traced her condition to an "intolerance to breathing odor from stain sprays" and included this diagnosis in a note to her employer, the Defendant. In the note, Dr. Peeler reminded the Defendant of the Plaintiff's "allergy to stain [with] rash on forearms." (Pl. Exh. 1, p. 22), and recommended "work in a clear atmosphere." (Pl. Exh. 1, p. 22).

(6) Regarding the 10 or more allergy cases involving Null employees that Dr. Peeler could recall, he testified that "usually if I state that a patient is

having problems the management follows through. I haven't had any problems at all." From this testimony, it is clear that the employee would have experienced continuing difficulties and needed continual treatment if not removed from the irritant by the management officials employed by the Defendant.

(7) Mr. J.D. O'Leary, Plaintiff's immediate supervisor, had an eighth-grade education and had been employed with the Defendant for one year when the Plaintiff submitted her note from Dr. Peeler. He was not employed with the Defendant when the Plaintiff experienced the rash on her hands in April, 1979. Mr. O'Leary phoned Dr. Peeler to determine the basis for the doctor's diagnosis and concluded that her allergy was not a "medical fact." However,

on July 28, 1980, Mr. O'Leary transferred the Plaintiff to the position of Hand Sander of furniture frames, located 20 feet from the Stain and Spray Department. Mr. O'Leary placed in the Plaintiff's personnel file a memorandum, dated July 28, 1980, stating that he had informed the Plaintiff "that if she failed to perform said job [hand sanding] she would be terminated." (Pl. Exh. 1, p. 20) [emphasis added]. The Plaintiff denied seeing this memo, receiving a copy of it, or being informed that said job required wiping or spraying stain.

(8) On July 31, 1980, Mr. O'Leary placed a second memorandum in the Plaintiff's personnel file, stating that the Plaintiff "would not accept" a position in Plant No. 1, the machine plant, and that the

Plaintiff "was told that if she refused to do any job when asked she would be terminated." (Pl. Exh. 1, p. 21) [emphasis added]. The Plaintiff denies that such an offer of employment was made, that she saw the memo, and that she received a copy of the memorandum. Mr. O'Leary did not know if he had a specific job in mind for her nor if any specific job had been identified to her. This Court finds that the Plaintiff did not receive a copy of this memorandum.

(9) In the Defendant's answer to the EEOC charge, the Plaintiff was reported to have refused to wipe stain on July 31, 1980 and then to have refused to transfer to another plant (P. Exh. 11). There was no other evidence of this reported incident introduced at trial.

(10) On August 26, 1980, the Plaintiff was working with others including Lester Taylor, in the Hand Sanding Department. She was requested by Mr. O'Leary to wipe stain and refused to do so because of her allergy. The Plaintiff was immediately terminated.

(11) Mr. O'Leary explained that he did not request Mr. Taylor, caucasian, to wipe stain because he understood that Mr. Taylor had "bad eyes," although there was no medical excuse in his personnel file, nor could Mr. O'Leary remember receiving a doctor's note. Mr. O'Leary further explained his decision not to request Mr. Taylor to wipe stain as a "business decision," since Mr. Taylor was not as "experienced" as the Plaintiff at wiping stain. However, Mr. O'Leary had only been

employed with the Defendant 13 months and admitted not knowing Mr. Taylor's background with the company. Mr. O'Leary stated at the hearing that he could have requested the Plaintiff to relieve another position for which she was qualified, such as sanding small wooden parts, so that the employee in that position could wipe stain. After the Plaintiff was terminated and left the facility on August 26, 1980, Mr. O'Leary requested the caucasian employee hand sanding small wooden parts to wipe stain.

(12) In the Defendant's answer to the EEOC charge, the Defendant's disciplinary procedure was described as follows:

> "when there is a violation of policy or procedure, a written warning is given to the employee and a copy is placed in his or her file. Should an employee

continue to violate company policy after the warning, he or she will be terminated."

(Pl. Exh. 11) The Plaintiff denied receipt of such a written warning prior to or upon her discharge, and there was no evidence of a second or "continuing" violation of company policy, other than the Defendant's answer to the EEOC charge (Pl. Exh. 11).

(13) At the time of the hearing, the Plaintiff was 40 years of age; she has a ninth-grade education and reported an unsuccessful continuous search for work since termination on August 26, 1980.

DISCUSSION

The parties have stipulated that the Defendant is an "employer" subject to civil suit under Title VII of the Civil Rights

Act of 1964, 42 U.S.C. §2000e et seq. The sole issue for determination is whether Plaintiff's termination amounted to unlawful discrimination against her because of her race. Defendant denies that the facts support such a conclusion, contending that Plaintiff's case amounts to nothing more than a dispute as to their job classification.

The Defendant's evidence, although in conflict as to the dates of the meetings, the content of the discussions, and the parties present, reflected several discussions as to the Plaintiff's job duties and transfer to another plant. The Plaintiff denies the number of discussions, denies any offer of another job in a cleaner environment, and contends that her transfer to hand sanding was with the

understanding that she would not be expected to return to the work that irritated her allergy. The Plaintiff was given an ultimatum to return to Stain Wiping or be terminated; she was given no explanation why a caucasian hand sander could not wipe stain or why she could not relieve a caucasian worker in another area so that the worker could wipe stain. The Defendant's agent, Mr. O'Leary testified that he honored the caucasian hand sander's excuse of "bad eyes" without a medical excuse or a phone call to an opthamologist.

The Act expressly includes "any agent" of an "employer." Therefore, the Defendant is responsible for the conduct of Mr. O'Leary. There is a definite causal relation between Mr. O'Leary's conduct and the termination of the Plaintiff. Mr. O'Leary

demanded a "medical fact" of Plaintiff's allergy; he made no such demand of Mr. Taylor's "bad eyes." Mr. O'Leary refused to excuse the Plaintiff from stain wiping or place her elsewhere; he made accommodations for Mr. Taylor.

It is true that the Plaintiff produced no evidence of verbalized racial animus on the part of Mr. O'Leary. It is also true that the Defendant introduced evidence of a corporate policy of equal opportunity for all employees. However, "Congress directed the thrust of the [Civil Rights] Ac to the consequences of employment practices, not simply the motivation." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), [emphasis in original].

From all the evidence then, this Court is compelled to find that the Defendant,

through its supervisor, Mr. O'Leary, intended to (1) question the validity of Plaintiff's allergy and honor the excuse in appearance only, (2) require her, in spite of this condition, to perform work in the area of exposure to known irritants, and (3) enforce its decision not to honor her medical excuse by firing her when she refused to perform the work that triggered her allergy. The Defendant took these three actions while intending: (a) not to require such "medical proof" of physical ailments of her caucasian co-workers and (b) not to require her caucasian co-workers, with undocumented physical ailments, to work in adverse conditions.

The consequences of the above-listed intentional employment practices was racial discrimination, whatever the

motivation might have been. Therefore, the totality of the Defendant's conduct amounted to an unlawful employment practice, prohibited by the Civil Rights Act, 42 U.S.C. §2000e - 2(a)(1). Slack v. Havens, 7 F.E.P. 885 (S.D. Cal. 1973), aff'd in part on other grounds, 552 F.2d 1091 (9th Cir. 1975). See also, Newman v. Avco Corp., 7 F.E.P. 385 (M.D. Tenn. 1973), amending findings of fact, 380 F.Supp. 1282, (M.D. Tenn. 1974), aff'd in part, rev'd in part, 15 F.E.P. 1413 (6th Cir. 1977).

CONCLUSIONS OF LAW

(1) The Court has jurisdiction over the action and the parties under 42 U.S.C. §2000e-5.

(2) The Defendant was an "employer" as defined by 42 U.S.C. §2000e(b) at all

time pertinent to this action and is thereby subject to suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.

(3) The discharge of the Plaintiff for her refusal to perform a discriminatory work assignment constituted, as a matter of law, an unlawful employment practice on the part of Defendant within the meaning of 42 U.S.C. §2000e-2(a)(1).

(4) The Plaintiff is entitled to judgment, including back wages, reinstatement, lost compensation and attorneys' fees. If the position of Hand Sander of Furniture Frames requires all employees, regardless of race or handicap, to wipe and spray stain on occasion, then the Plaintiff is to be reinstated to a position that does not require such exposure to the

chemical irritants.

(5) Punitive damages are not found to be appropriate, in view of Plaintiff's failure to demonstrate the Defendant's unlawful employment practices were committed willfully and for the clear purpose of discriminating against the Plaintiff because of her race.

IT IS THEREFORE

(1) ORDERED, ADJUDGED AND DECREED that the Plaintiff is entitled to judgment from the Defendant, including back wages, reinstatement, lost compensation, and attorneys' fees.

(2) ORDERED that briefs or a stipulation on the issue of damages and a statement on the amount of attorney fees shall be filed not later than 20 days from filing of this Order.

This the 15th day of February, 1983.

/s/ Robert D. Potter
Robert D. Potter
United States District Judge

Charlotte District Office
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
403 N. Tryon Street
Charlotte, North Carolina 28202

CERTIFIED MAIL NO. _____

Charge No. 045801130

Mayzell Littlejohn
401 South D
Maiden, N.C. 28650
Charging Party

and

Null Manufacturing Company
P. O. Box 617
Maiden, N.C. 28650
Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

The Charging Party alleged that Respondent

discriminated against her because of her race (Black) by discharging her. Examination of the evidence indicates that there is not reasonable cause to believe that this allegation is true. No determination is made as to any other issue raised by or which might be construed to have been raised by the subject charge.

This concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, the Party may do so by filing a private action in Federal District Court against the Respondent named above within 90 days following receipt of this letter and by taking the other procedural steps set out in the attached Notice of Right-to-Sue.

On behalf of the Commission:

_____

James H. Troy
District Director

September 9, 1981
Date

Enclosures: (2)
Notice of Right-to-Sue
Copy of the Charge

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-284

NULL MANUFACTURING CO.,

Petitioner,

v.

MAYZELL LITTLEJOHN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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OPINIONS BELOW

The Memorandum and Order filed by the District Court on February 16, 1983, is set forth in the Appendix to the Petition at p. 22a. The Memorandum and Order of the District Court filed May 4, 1983, in response to the Defendant's Motion for Reconsideration is set forth in the Appendix to this Brief at p. 1b.

The opinion of the United States Court of Appeals for the Fourth Circuit filed April 4, 1984, and that Court's Order denying rehearing are set forth in the Appendix to the Petition at pp. 3a and 1a respectively.

STATEMENT OF THE CASE

A. Prior Proceedings--On December 10, 1981, after exhausting administrative remedies, Mayzell Littlejohn ("plaintiff"), a black female, instituted this action against Null Manufacturing Company ("Null" or the "Company") alleging that she was discharged on August 27, 1980, because of her race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. and 42 U.S.C. §1981. Trial was held on January 28, 1983.

On February 16, 1983, the District Court filed a Memorandum and Order (Pet. 22a) [1/] with its Findings of Fact (Pet. 23a) and Conclusions of Law (Pet. 37a). The trial court ruled for plaintiff concluding that Null had discriminatorily refused to honor plaintiff's doctor's opinion that plaintiff should be kept away from known irritating chemicals even though the Company had made allowances for whites who had undocumented medical problems and that the Company had refused to assign available and qualified whites to the job of wiping stain to which plaintiff was assigned after her doctor recommended she not work with stain (Pet. 34a, 26a). Specifically, the District Court found (Pet. 35a-36a):

[1/] References to the Petition and the Appendix to the Petition will be "Pet". References to the Appendix to this Brief in Opposition will be "Br. Opp". References to the Joint Appendix filed in the Court of Appeals will be "JA".

> That the Defendant, through its supervisor Mr. O'Leary, intended to (1) question the validity of Plaintiff's allergy and honor the excuse in appearance only, (2) require her, in spite of this condition, to perform work in the area of exposure to known irritants, and (3) enforce its decision not to honor her medical excuse by firing her when she refused to perform the work that triggered her allergy. The Defendant took these three actions while intending: (a) not to require such "medical proof" of physical ailments of her caucasian co-workers and (b) not to require her caucasian co-workers, with undocumented physical ailments, to work in adverse conditions.

On March 15, 1983, Defendant filed a Motion for Reconsideration. The District Court, on May 4, 1983, entered a second Memorandum and Order (Br. Opp. 1b) [2/] denying defendant's motion. Citing and following decisions of this Court, it concluded that plaintiff had presented a prima facie case of racial discrimination and that, while defendant had articulated a legitimate reason for its actions, plaintiff had sustained her ultimate burden of persuasion that defendant's explanation was pretextual and that her termination was racially motivated. The Court stated (Br. Opp. 4b):

> The Court found the Defendant's proferred explanation to be wholly unworthy of any credence. When cross-examined about "business necessity" and "work flow," Mr. O'Leary could only repeat these conclusory words, giving no fact of the employment experience of the Plaintiff's co-workers, their education and skills, the Defendant's production schedules, or work-flow organization charts to support those conclusions. Thus, "indirectly [the Plaintiff] show[ed] that the employer's proffered explanation is unworthy of credence."

On April 4, 1984, the United States Court of Appeals for the Fourth Circuit filed a decision affirming the District Court (Pet. 3a). The Court of Appeals determined the District Court had utilized the proper legal standards and that neither the trial court's findings of fact nor its conclusion that plaintiff's termination was motivated by discriminatory intent were clearly erroneous. Null's petition for rehearing was subsequently denied (Pet. 1a).

[2/] Although the District Court's second Memorandum and Order filed May 4, 1983 further detailed the rationale for its decision, it is not set forth in the Petition.

B. Pertinent Facts--Plaintiff was hired by Null, a furniture manufacturer, on March 27, 1978, as a stain sprayer and wiper (also called "wiping stain"). Plaintiff was transferred to the job of hand sanding on July 28, 1980, and was involuntarily discharged on August 27, 1980.

On two separate occasions, plaintiff had severe physical reactions to the chemicals contained in the stain. On April 23, 1979, plaintiff was treated by Dr. Forrest E. Peeler for a rash on her hand. The Company frequently referred employees to Dr. Peeler for medical evaluations. He was generally regarded as the "Company doctor." (JA 102) Dr. Peeler diagnosed plaintiff's rash as an allergy "thought to be due to allergy to stain." (Pet. 26a; JA 142) He prescribed an anti-allergy medicine.

On July 25, 1980, the plaintiff began to have difficulty breathing and experienced nausea. She returned to Dr. Peeler for treatment. Dr. Peeler concluded that plaintiff's complaints were valid (JA 69) and that her condition was a result of breathing odor from stain sprays (JA 67-68, 142). In a note which plaintiff delivered to the defendant (JA 68, 141), Dr. Peeler advised the defendant that plaintiff was experiencing physical problems because of her breathing stain and reminded the defendant of the rash that the plaintiff had in April 1979 with respect to stain. Dr. Peeler recommended that plaintiff be placed in a job where she would not come in contact with stain.

Dr. Peeler had treated many employees of the defendant prior to July 1980. A number of those employees whom Dr. Peeler had seen prior to July 1980 (in excess of ten) had experienced reactions to chemicals used at Null's plants. Dr. Peeler testified (JA 70) that in all prior cases the defendant had followed his recommendations for treatment to alleviate the problems with chemicals without questioning the validity of his diagnosis (Pet. 26a).

The plaintiff's supervisor as of July 25, 1980, was J. D. O'Leary. The plaintiff gave O'Leary the note from Dr. Peeler indicating that on two occasions she had physical reactions to

stain and recommending that she be placed in a job where she would not come in contact with stain (JA 19). Plaintiff had previously told O'Leary that the stain was making her ill (JA 148), and he acknowledged that she had a "reaction" (JA 19) to stain.

O'Leary telephoned Dr. Peeler who read and explained the note he had given the plaintiff (Pet. 6a; JA 149). Dr. Peeler told O'Leary that "stain made her sick and she couldn't work in it" (JA 149). Despite the doctor's advice O'Leary unilaterally determined the diagnosis was not a "medical fact" (JA 151-152). Nonetheless, on July 28, 1980, O'Leary transferred plaintiff to the position of hand sander, a job which did not require the plaintiff to come in contact with stain (JA 21). The transfer was made reluctantly by O'Leary, and plaintiff was told on July 28 that if she asked for anything else she was "going out the door, and that was it" (Pet. 7a; JA 49).

Wiping stain was generally regarded as an unattractive and less desirable job. Sometime after O'Leary began to work for Null, he allowed Connie Morrow (white) to transfer from wiping stain to a more desirable job in a cleaner area (JA 28-29). No evidence was presented that Morrow had a medical reaction to stain.

After the plaintiff was moved from wiping stain to sanding, she experienced no physical problems (A. 63-64). During the period from July 28, 1980 to August 27, 1980, six employees worked in sanding: Lester Taylor, Connie Morrow and Frances Wilkerson (all white), Janester Henry and Helen Kee (both black) and the plaintiff. From July 28 to August 26, Henry and Kee were required to wipe stain even though wiping stain was not part of their usual job duties. No whites were required to wipe stain during this period (Pet 8a; JA 51-52).

On August 27, 1980, an employee whose job was to wipe stain had to leave the plant early. O'Leary directed the plaintiff to wipe stain even though he knew that plaintiff's doctor had recommended she not be asked to come into contact with the

chemicals in stain (JA 23) and even though there were available at least three white employees working as sanders, Taylor, Morrow, and Wilkerson, and two other white employees working nearby, Roberta Boles and Jettie Hoyle, all of whom were qualified and able to wipe stain and none of whom had a history of allergy to the chemicals in stain (Pet. 7a, 31a). When asked to wipe stain, the plaintiff explained again to O'Leary that she should not wipe stain because she was allergic to the chemicals in stain and reminded him of the letter she had brought from Dr. Peeler (JA 53). O'Leary immediately terminated the plaintiff (Pet. 30a).

When asked at trial why he had not assigned Taylor, a white, to wipe stain, O'Leary responded only that he had made a "business decision" and that, even though Taylor previously worked as a stainer, he assertedly had "bad eyes" (JA 23-25). There was no medical evidence or documentation in Taylor's file to indicate any eye problem (JA 26), and O'Leary admitted he was not familiar with Taylor's medical or work background (Pet. 8a, 30a; JA 25). When asked why the other white employees who were well qualified to wipe stain were not asked to do so, O'Leary responded that those employees were doing jobs that needed to be done at the time. He admitted however that some of the whites were sanders like the plaintiff; that the plaintiff was qualified to perform the jobs that the white employees who were not allergic to the chemicals in the stain were performing; and that he could have moved the plaintiff to another employee's job (not requiring contact with stain) and still kept the "work flow" going (Pet. 31a, 34a; JA 27-38).

When questioned why plaintiff, the only employee who had problems with stain, was asked to wipe stain when there were many others who had no intolerance to the chemical available to do so (including other sanders), O'Leary spoke of "work flow" and his "business decision" (JA 24, 37, 160). When asked why plaintiff was required to wipe stain despite a recommendation from her

doctor to the contrary while all other employees with reactions to chemicals had previously been removed from contact with the offensive materials on Dr. Peeler's advice, O'Leary offered no explanation (JA 87).

When O'Leary told plaintiff she was fired, plaintiff continued to work as a sander (JA 82-83). Plaintiff reminded him about Dr. Peeler's previous statement and her illness, but her time card was pulled and punched (JA 53). The plaintiff asked for, but was denied, permission to use the telephone to get a ride home, left the plant, and walked three miles home (JA 52, 116).

At the time of plaintiff's discharge, Null used a "progressive disciplinary system" (JA 128). Under that policy, a written warning is given to an employee who violates for the first time the rule prohibiting "(a) refusing assigned job or walking off the job" (JA 129). Discharge is the stated penalty only for a second violation of this rule. Plaintiff testified and the Court found that plaintiff was given no warning for refusing to do an assigned job prior to August 27, 1980 (JA 114, Pet. 31a-32a).

REASONS FOR DENYING THE WRIT

The decision below is correct and consistent with the rulings of this Court. Petitioner has presented no issue meriting review.

A. CERTIORARI IS INAPPROPRIATE AS THE PETITION ESSENTIALLY REQUESTS THIS COURT TO REVIEW THE EVIDENCE ONCE AGAIN.

As the Company admits, this was a fact-sensitive case which required the District Court to resolve credibility issues and determine the motivation of the employer. For example, although the employer argued no one other than Ms. Littlejohn was available to wipe stain, the District Court found the evidence was otherwise and the Court of Appeals upheld that finding of fact. This Court "do(es) not grant a certiorari to review evidence and discuss specific facts", United States v. Johnson, 268 U.S. 220, 227 (1925), especially where, as here, two lower courts have concurrently agreed upon the facts. Graver Tank and Mfg.Co. v.

Linde Air Products Co., 336 U.S. 271, 275 (1949).

B. PETITIONER PRESENTS NO IMPORTANT ISSUE CONCERNING FEDERAL ANTI-DISCRIMINATION LAW

Petitioner does not allege any conflict among the circuits concerning any legal issue, and Respondent is aware of none. While Petitioner contends this case demonstrates a "frequent error" made in the area of employment discrimination (Pet. 14), it cites no other cases where such alleged error has surfaced.

The determination of intent and motivation in discrimination cases is a "pure question of fact subject to Rule 52(a)'s clearly erroneous standard," Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982). The courts below cited and correctly followed (Pet. 10a-13a; Br. Opp. 2b-4b) this Court's decisions which have established a method of determining such facts. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The analysis suggested in McDonnell-Douglas and Burdine is designed to assist the trial court in deciding "which party's explanation of the employer's motivation it believes." United States Postal Service Board of Governors v. Aikens, ____U.S.____, 75 L.Ed.2d 410, 411 (1983). It is the accepted method to be used by a trial court in deciding whether race influenced the challenged decision. As this Court stated in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978):

> A prima facie case under McDonnell-Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.... And we are willing to presume this largely because we know from our own experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons...have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.

Thus, the method of analysis established in McDonnell-Douglas and Burdine and most recently approved yet again in Aikens is not

an evaluation to be made after the issue of race is demonstrated but rather is the very analysis which is to be used to determine if a challenged decision was made "because of race." If a plaintiff can show a prima facie case of race discrimination and, as here, show that all of the defendant's articulated reasons for its action are false, then the courts have indicated that as a matter of law it is presumed that race motivated the employer and the plaintiff should prevail.

Null "articulated" only one reason for its admitted disparate treatment of the plaintiff "business necessity--work flow" (Br. Opp. 4b). It was the duty of the District Court to evaluate the parties' arguments in light of the specific arguments advanced by the employer. Lanphear v. Prokop, 703 F.2d 1311, 1314-1317 (D.C. Cir. 1983). As the Lanphear Court emphasized, the purpose of the allocation rules established in McDonnell- Douglas and Burdine is to "focus the issues and provide plaintiff with a 'full and fair opportunity' to attack the defendant's purported justification. That purpose is defeated if defendant is allowed to present a moving target or...conceal the target altogether." Id. at 1316. Once plaintiff showed that reason to be pretextual, the trial court should not "speculate upon evidence not admitted at trial" (A. 211), Burdine, supra at 255, n.9, and thus the district court below properly held for plaintiff. There is simply no authority for the Company's suggestion that some other unarticulated test should be substituted for the analysis consistently approved by this Court and used below to determine if a challenged action was "because of race."

C. THE DECISION BELOW IS SUPPORTED BY THE EVIDENCE

Plaintiff presented a prima facie case of disparate treatment. The Company so admitted in its motion for reconsideration:

> In its Memorandum, the Court found and concluded that without requiring "medical proof" of Taylor's ailment, O'Leary chose not to require Taylor "to work in adverse conditions" - but that on the other hand O'Leary chose to doubt and to "question the validity of" the Plaintiff's allergy, and did not "honor her medical excuse," but instead required her "to perform work in the area

> of exposure to known irritants," and finally discharged her "when she refused to perform the work that triggered her allergy." (Memorandum, p. 6). In this Motion, the Defendant raises no question but that these findings are within the fact-finding province of the Court (JA 182).
>
> .
> .
> .
>
> As stated above, the Court has made findings, which this Motion does not contest, that the Defendant, through its supervisor O'Leary, did not deal even-handedly as between the Plaintiff and her fellow employee Taylor, but instead imposed unfairly disparate treatment upon the Plaintiff to her detriment and harm. There was thus an unfair discrimination by the Defendant against the Plaintiff (JA 183).

The Company articulated as its defense that only plaintiff was available to wipe stain and that it was justified in requiring her to take action which threatened her health because of "business necessity - work flow." Plaintiff successfully rebutted Null's "articulation" and demonstrated that the Company's admitted discrimination was racially motivated by showing (1) that the Company had readily followed Dr. Peeler's recommendations on all other occasions where employees had allergies to chemicals; (2) that O'Leary responded to plaintiff's medical problem with singular harshness; (3) that plaintiff was ordered to wipe stain on August 27, 1980, even though there were at least four non-allergic white employees who were qualified and available to wipe stain and whose jobs plaintiff could perform without harming work flow; (4) that the Company accepted the undocumented medical limitations of a white (Taylor) while refusing to adhere to Dr. Peeler's clear advice concerning the plaintiff; and (5) that plaintiff was fired contrary to Null's published work rules which required at least one warning if an employee refused to perform assigned work.

The District Court concluded this evidence of disparate treatment demonstrated intentional racial discrimination (Pet. 36a), and the Court of Appeals held the trial Court's findings were not erroneous (Pet. 10a). The defendant contends the

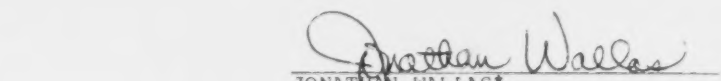
District Court failed to make the requisite finding of intent and quotes an alleged conflicting portion of Paragraph 5 of the Conclusions of Law (Pet. 23). However, Paragraph 5 embodies the District Court's conclusion that punitive damages should not be awarded (Pet. 39a). The words "willfully" and "clear purpose" used in that paragraph refer to the more stringent burden the plaintiff needed to carry to obtain punitive damages and should be read in its context. The rationale of the District Court is abundantly clear. It specifically found the defendant had acted intentionally (Pet. 26a), and the defendant admitted "unfair discrimination" (JA 183). 3/

The trial court did not believe Null's explanation for its conduct, and the evidence discussed herein shows ample support for the finding of discrimination. It is not the role of this Court to retry factual issues, and it should not do so here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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September 14, 1984

3/ The defendant also cites the EEOC findings. However, District Court Title VII trials are de novo proceedings, Chandler v. Roudebush, 425 U.S. 840 (1976). The EEOC determination here (Pet. 41a) is merely conclusory and is not binding.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

ST-C-81-143

FILED
STATESVILLE, N. C.

MAY 4 1983

U. S. DISTRICT COURT
WESTERN DISTRICT OF N.C.

MAYZELL LITTLEJOHN,

Plaintiff,

vs.

NULL MANUFACTURING CO.,

Defendant.

MEMORANDUM AND ORDER

THIS MATTER is before the Court for ruling upon the Defendant's motion to alter or amend the Judgment entered on February 16, 1983, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, and for ruling upon the Plaintiff's motion, as amended, for attorneys' fees, pursuant to 42 U.S.C. §2000e-5(k), 42 U.S.C. §1981, and pursuant to the Judgment of this Court.

The Court, having reviewed the memoranda of law and affidavits submitted by counsel, and being of the opinion that the Judgment entered on February 16, 1983 should not be altered or amended, and being further of the opinion that the Plaintiff should be reinstated, awarded the back pay agreed upon by the parties, with pre-judgment interest and without reduction for AFDC payments, and awarded costs and reasonable attorneys' fees, enters the following Memorandum and Order:

DISCUSSION

I. Motion to Alter or Amend the Judgment

The Defendant contends that this Court must vacate its Judgment for the Plaintiff because:

(a) there was no direct evidence of personal racial animus on the part of Mr. O'Leary or Mr. Gamble,

(b) there were no statistics of racially discriminatory hiring or promotion practices,

(c) there was no evidence of bias in the employment application process, and

(d) "[t]here may have been an unlimited variety of considerations, unreasonable and unfair, which caused Mr. O'Leary to discriminate against the Plaintiff" (Defendant's Memorandum, p. 7).

The Defendant's position appears to be two-tiered: (1) the Court's finding of a prima facie case was erroneous for lack of direct evidence of discriminatory motivation, and (2) the Court's ultimate factual finding was erroneous because there were "unlimited" possible non-discriminatory reasons for the discharge of the Plaintiff.

First, direct proof of discriminatory motivation is not required for the presentation of a prima facie case under 42 U.S.C. §2000e. See, United States Postal Service Bd. of Governors v. Aikens, 51 U.S.L.W. 4354 (No. 81-1044, April 4, 1983); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

Second, the statistics, to which the Defendant refers in his argument, are customarily offered in a disparate impact case, to provide the discriminatory effect of facially neutral

employment standards upon minorities. The case at bar, however, is a disparate treatment case, and the Court has found that the Plaintiff presented sufficient evidence (detailed in the Court's Memorandum) of treatment which created the rebuttable presumption that of the "unlimited" possible reasons for the treatment, the employer was in fact motivated by an unlawful discriminatory reason. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

At trial, the Defendant presented evidence that the disparate treatment occurred for a "legitimate, nondiscriminatory" business purpose.

> "At this stage, the McDonald-Burdine presumption 'drops from the case' and 'the factual inquiry proceeds to a new level of specificity.'
>
> * * *
>
> As we stated in Burdine:
>
> > 'The plaintiff retains the burden of persuasion. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.' 450 U.S., at 256.
>
> In short, the district court must decide which party's explanation of the employer's motivation it believes.
>
> All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes."

United States Postal Service, supra at 4355-4356. (citations in text other than lengthy quote from Burdine omitted).

The Court found the Defendant's proffered explanation to be wholly unworthy of any credence. When cross-examined about "business necessity" and "work flow," Mr. O'Leary could only repeat these conclusory words, giving no facts of the employment experience of the Plaintiff's co-workers, their education and skills, the Defendant's production schedules, or work-flow organization charts to support those conclusions. Thus, "indirectly [the Plaintiff] show[ed] that the employer's proffered explanation is unworthy of credence."

Although the Defendant in its motion, ruminates over the "unlimited variety of considerations, unreasonable and unfair, which could have caused" the Plaintiff's discharge, the Defendant proffered only one reason at trial: business necessity - work flow. The Court would not be called upon in any other type of litigation to speculate upon evidence not admitted at trial, and declines to do so in this case. The Plaintiff sustained her burden of presenting a rebuttable prima facie case of discrimination; the Defendant produced evidence of one "legitimate, non-discriminatory reason" for the disparate treatment; and the Plaintiff again sustained her burden of persuasion that this proffered reason was pretextual. Thus, the Plaintiff has prevailed in her case, and the Court will now address the remedy issue.

II. Appropriate Remedy

The Judgment entered decrees that "the Plaintiff is entitled to...back wages, reinstatement, lost compensation, and attorneys' fees." (Memorandum and Order, p. 7). The Court finds reinstatement appropriate in this case, particularly in light of the Plaintiff's affidavit, filed March 7, 1983, stating her willingness and readiness to return to her work with the Defendant. This is consistent with her testimony at trial, when she discussed her friendships with her co-workers.

The parties have agreed as to the amount of Plaintiff's back wages:

DATE		AMOUNT
August 27, 1980 - December 31, 1980	- -	$1,978.00
1981	- -	$6,922.32
1982	- -	$9,525.34
January 1, 1983 - February 26, 1983	- -	$1,632.04
each week after February 26, 1983	- -	$ 204.00
(7 weeks through April 15, 1983, $1,428.00)		
TOTAL	- -	$21,485.70

The Defendant contends that because the Plaintiff received, on the behalf of her children, benefits under Aid to Families with Dependent Children Act, N.C. Gen. Stat. §108.38 et seq. (1978), repealed and recodified N.C. Gen. Stat. §108A-27 et seq. (Supp. 1981)), the back pay award should be reduced by the

amount of this public assistance. The Court finds this contention repugnant to the policies underlying the program of Aid to Familes with Dependent Children and the Civil Rights statute, which provides:

> "[i]nterim earnings or amounts earnable with reasonable diligence by the person...discriminated against shall operate to reduce the back pay otherwise allowable."

42 U.S.C. §2000e-5(g). (Emphasis added).

Payments from federal and state tax funds to provide a subsistence level of food and clothing for children do not constitute "earnings" under 42 U.S.C. §2000e-5(g). The deprivation of an "adequate means of support" for the children of a victim of discrimination is a collateral loss, not compensated by the Civil Rights Act. Similarly, the AFDC payments are collateral benefits which should not be considered in reducing the compensation award under 42 U.S.C. §2000e-5(g). The Court finds that the Plaintiff will not be made "more than whole" by this decision. See, NLRB v. Gullett Gin Co., 340 U.S. 361, 364 (1951) (The Court refused to reduce an NLRA award by the amount of unemployment compensation received by the plaintiff); EEOC v. Ford Motor Co., 645 F.2d 183, 195-196 (4th Cir. 1981), rev'd on other grounds, 50 U.S.L.W. 4937, 73 L.Ed 2d 721 (No. 81-300, June 28, 1983). (The Fourth Circuit refused to reduce a Title VII back pay award by the amount of unemployment compensation received by the plaintiff), quoting Abron v. Black & Decker Manufacturing Co., 439 F.Supp. 1095, 1115 (D. Md. 1977); Gurmankin v. Maicase, 23 E.P.D. ¶31,119 (E.D. Pa. 1980). (The

court refused to deduct public assistance benefits from a Title VII back pay award).

"Back pay must be allowed from the time an employee is denied an employment opportunity until [s]he actually receives it....the award...shall...continue until the employee is [placed in] the job to which...[s]he is entitled." EEOC v. Korn Ind., Inc., 662 F.2d 256 (4th Cir. 1981), citing Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976), cert. denied, 429 U.S. 920 (1976). Thus, this Court's award of back pay will continue until the Plaintiff is actually reinstated, at the rate agreed upon by the parties, $204.00 per week.

The Plaintiff has requested pre-judgment interest under N.C. Gen. Stat. §24-1 (Supp. 1981), up to the date of judgment, and post-judgment interest pursuant to 28 U.S.C.A. §1961(a) (West Pamphlet No. 1, June, 1982). The Fourth Circuit has recently approved a discretionary award of pre-judgment interest under the North Carolina statute in a Title VII case. EEOC v. Liggett & Myers, Inc., 690 F.2d 1072, 1074-1075 (4th Cir. 1982). See also, Marshall v. Bd. of Ed., 470 F.Supp. 517 (D.Md. 1979), aff'd without opinion, 618 F.2d 101 (4th Cir. 1980). Therefore, this Court awards the Plaintiff pre-judgment interest at the rate of 8% "from the time the action [was] instituted" (December 10, 1981) until the date of this amended judgment. (N.C. Gen. Stat. §24-5 (Supp. 1981)). From the date of this amended judgment until such judgment is paid and satisfied, the Plaintiff shall receive 8.98% interest (28 U.S.C.A. §1961(a) (West Pamphlet No. 1, June, 1982)).

The Judgment entered awarded but did not quantify Plaintiff's attorneys' fees. The Fourth Circuit has outlined the factors to be considered in such calculation:

> "first ascertain the nature and extent of the services supplied by the attorney[s] from a statement showing the number of hours worked and an explanation of how these hours were spent. The court should next determine the customary hourly rate of compensation....The court should then multiply the number of hours reasonably expended by the customary hourly rate to determine an initial amount for the fee award. Finally, the court should adjust the fee on the basis of the other factors, briefly explaining how they affected the award."

Anderson v. Morris, 658 F.2d 246, 249 (4th Cir. 1981). (Emphasis added). The adjusting factors are detailed in Barber v. Kimbell's Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978) and Anderson, supra at 248 n.2.

Plaintiff's counsel have submitted their itemized record of hours spent by three attorneys and a list of expenses incurred in this case. The record documents that no duplication of labor was included and that the rates charged are customary for their field of practice and for the relevant geographical area: $110/hr. for lead counsel, Mr. Chambers, $90/hr. for the assistance of one of his partners, Mr. Wallace, and $60/hr. for the substantial contribution of a junior member of the firm, Ms. Glazer. Counsel amended its record to be current as of March 23, 1983. However, on April 11, 1983, Mr. Wallace submitted additional authority for the Plaintiff's response to the Defendant's "Motion for Reconsideration." The Court has assigned .5 hour at Mr. Wallace's rate for that submission. The Court, concludes that the base figure for the attorneys' fee award in

this case is $8.955.00, excluding costs and expenses, totaling $918.00 (having been increased slightly for mailing and photocopying the April 11th submission).

The Court has reviewed the adjusting factors and concludes that the primary factors in favor of a moderate increase in the award are:

(a) the wholly contingent nature of the case and the importance to society of firms willing to accept such cases;

(b) the preclusion of fee-based cases, while the attorneys worked on this case;

(c) the perceived undesireability of litigating Title VII cases, particularly when the injured party has no funds whatsoever to give counsel;

(d) the skill, experience, and reputation of counsel, efficiently and concisely presenting the case in the pre-trial brief and at trial;

(e) the results obtained and amount in controversy, counsel has been successful in obtaining for its client all the relief sought; and

(f) the fee allowed here is well within the reasonable range of Title VII attorneys' fee awards in similar cases.

The factors moderating that increase are:

(a) the absence of extreme novelty or difficulty of the legal issues in the case

(c) the absence of unreasonable time demands sometimes experienced in complex litigation.

Since the Plaintiff is a one-time client, the factor of professional relationships is not relevant.

In conclusion, the Court declines to award the 1.5 multiplier sought by Plaintiff's counsel, finding reasonable attorneys' fees through April 15, 1983 to be $11,977.20. The expenses to be recovered are $918.00.

IT IS, THEREFORE, ORDERED that:

(1) The Defendant's motion to alter or amend the Judgment entered February 16, 1983 is DENIED;

(2) The Plaintiff, pursuant to the Judgment, be immediately reinstated by the Defendant and have and recover of the Defendant $21,485.70 in backpay continuing $204.00 per week until reinstatement is effected;

(3) The Plaintiff receive pre-judgment interest from December 10, 1981 to the date of this Order at the rate of 8% per annum and receive post-judgment interest from this date until paid and satisfied at the rate of 8.98% per annum;

(4) Plaintiff's counsel receive $11,977.20 for attorneys' fees and $918.00 for costs and expenses.

This the 2nd day of ~~April~~ May, 1983.

ROBERT D. POTTER
UNITED STATES DISTRICT JUDGE